

No. 15645

United States
Court of Appeals
for the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WILLIAM L. KOCH, ROSE KOCH, REBECCA KOCH ABEL, MAURICE P. KOCH, and DAISY KOCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Northern District of California.
Southern Division.

FILED
JAN 22 1958
PAUL F. CRISWELL, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court in and for the
Northern District of California, Southern Division

Civil Action No. 34762

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH and
DAISY KOCH,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**COMPLAINT FOR RECOVERY OF FEDERAL
INCOME TAXES ERRONEOUSLY AND
ILLEGALLY COLLECTED**

Comes Now Plaintiff, Harold M. Koch, and for a
First Cause of Action Against the Defendant
Alleges That:

I.

This action is brought against the United States
for recovery of federal income taxes erroneously,
illegally and wrongfully assessed and collected un-
der the internal revenue laws of the United States;
it is brought pursuant to the provisions of U.S.C.
Title 28, Section 1346(a) (1).

II.

This action is to recover income taxes paid for
the calendar years 1945 and 1947. The plaintiff's in-
come tax returns for said years were duly filed with

XI.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$223.00, and on March 15, 1951 plaintiff filed an amended claim for refund for said \$223.00 in connection with his 1947 income tax return which represented all of the income tax paid by plaintiff on the said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on his 1947 income tax return in the amount of \$9,375.00 which was plaintiff's one half community share of his \$18,750.00 chargeable loss on the aforementioned \$75,000.00 loss. A copy of said original claim, marked Exhibit A, and a copy of said amended claim, marked Exhibit B, is attached hereto, and is incorporated by reference.

XII.

The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954 that said \$9,375.00 chargeable loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner in 1947 only in the amount of \$1,000.00.

XIII.

Subsequently the amount of \$107.00 was refunded to plaintiff on the basis said loss was a capital loss

and the balance of said claims in the amount of \$116.00 was disallowed.

XIV.

Said disallowance of \$116.00 was wrongful, erroneous, and illegal in that said loss of \$9,375.00 was either a business bad debt, a loss incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana, and therefore deductible in full by plaintiff.

XV.

No part of said sum of \$116.00 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid and owing to plaintiff from defendant.

Second Count

I.

Plaintiff, Harold M. Koch, Incorporates in This Second Count, All the Allegations Contained in Paragraphs I to X Inclusively of the First Count With the Same Force and Effect as Though Fully Set Forth Herein.

II.

In connection with his 1945 income tax return, plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$8,842.22.

III.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$318.00, and on March 15, 1951, plaintiff filed an amended claim for refund for said \$318.00 in connection with her 1947 income tax return which represented all of the income tax paid by plaintiff on the said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on her 1947 income tax return in the amount of \$9,375.00, which was plaintiff's one half community share of her husband's \$18,750.00 chargeable loss on the aforementioned \$75,000.00 loss. A copy of said original claim, marked Exhibit E, and a copy of said amended claim, marked Exhibit F, is attached hereto, and is incorporated by reference.

IV.

The Commissioner of Internal Revenue, through the Office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954, that said \$9,375.00 chargeable loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner only in the amount of \$1,000.00.

V.

Subsequently the amount of \$107.00 was refunded to plaintiff on the basis said loss was a capital loss

and the balance of said claim in the amount of \$211.00 was disallowed.

VI.

Said disallowance of \$211.00 was wrongful, erroneous, and illegal in that said loss of \$9,375.00 was either a business bad debt, a loss incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, *Copacabana*, and therefore deductible in full by plaintiff.

VII.

No part of said sum of \$211.00 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid, and owing to plaintiff from defendant.

Fourth Count

I.

Plaintiff, Bessie Koch, Incorporates in This Fourth Count, All the Allegations Contained in Paragraphs I to IX Inclusively of the First Count With the Same Force and Effect as Though Fully Set Forth Herein.

II.

In connection with her 1945 income tax return, plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$9,126.41.

II.

Plaintiff and his wife, Rose Koch, filed separate returns for the year 1947, and did not claim any portion of said \$18,750.00 loss on said returns.

III.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$223.00, and on March 15, 1951 plaintiff filed an amended claim for refund for said \$223.00 in connection with his 1947 income tax return which represented all of the income tax paid by plaintiff on the said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on his 1947 income tax return in the amount of \$9,375.00, which was plaintiff's one half community share of his \$18,750.00 chargeable loss on the aforementioned \$75,000.00 loss. A copy of said original claim, marked Exhibit I, and a copy of said amended claim, marked Exhibit J, is attached hereto, and is incorporated by reference.

IV.

The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954 that said \$9,375.00 chargeable loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner in 1947 only in the amount of \$1,000.00.

V.

Subsequently the amount of \$107.00 was refunded to plaintiff on the basis said loss was a capital loss and the balance of said claims in the amount of \$116.00 was disallowed.

VI.

Said disallowance of \$116.00 was wrongful, erroneous, and illegal in that said loss of \$9,375.00 was either a business bad debt, a loss incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana, and therefore deductible in full by plaintiff.

VII.

No part of said sum of \$116.00 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid and owing to plaintiff from defendant.

Sixth Count

I.

Plaintiff, William L. Koch, incorporates in this sixth count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

In connection with his 1945 income tax return plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$8,842.22.

III.

Plaintiff incurred a net operating loss for the calendar year 1947 in the amount of \$6,592.72 which loss is allowable as a net operating loss deduction carryback for the calendar year 1945.

IV.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$3,623.90 in connection with said 1945 income tax return, and on March 15, 1951, plaintiff filed an amended claim for refund in the same amount of \$3,623.90. Said claims were based on the ground that plaintiff was entitled to a net operating loss deduction of \$6,592.72 for said year and in particular that plaintiff's \$18,750.00 chargeable share of the aforementioned \$75,000.00 loss was a loss from the operation of a business regularly carried on by said H. Koch & Sons. A copy of said original claim, marked Exhibit K, and a copy of said amended claim, marked Exhibit L, is attached hereto, and is incorporated by reference.

V.

The Commissioner of Internal Revenue, through the Office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954 that his ruling was that said \$75,000.00 loss was a non-business loss and that therefore plaintiff could not include his share of said loss in a net operating loss. Said claims for refund were therefore denied.

VI.

Said disallowance of said claims for refund was wrongful, erroneous, and illegal in that said \$75,000.00 loss and plaintiff's share of same was either a business bad debt, a loss incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana, and in any case constituted a loss from a business regularly carried on by H. Koch & Sons and therefore by plaintiff.

VII.

No part of said \$3,623.90 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, payable and owing to plaintiff from Defendant.

Seventh Count

Comes Now Plaintiff, Rose Koch, and for a Seventh Cause of Action Against the Defendant Alleges That:

I.

Plaintiff, Rose Koch, incorporates in this seventh count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

Plaintiff and her husband, William L. Koch, filed separate returns for the year 1945, and did not claim any portion of said \$18,750.00 loss on said returns.

III.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$318.00, and on March 15, 1951, plaintiff filed an amended claim for refund for said \$318.00 in connection with her 1947 income tax return which represented all of the income tax paid by plaintiff on the said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on her 1947 income tax return in the amount of \$9,375.00, which was plaintiff's one half community share of her husband's \$18,750.00 chargeable loss on the aforementioned \$75,000.00 loss. A copy of said original claim, marked Exhibit M, and a copy of said amended claim, marked Exhibit N, is attached hereto and is incorporated by reference.

IV.

The Commissioner of Internal Revenue, through the Office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954, that said \$9,375.00 chargeable loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner only in the amount of \$1,000.00.

V.

Subsequently the amount of \$107.00 was refunded to plaintiff on the basis said loss was a capital loss

and the balance of said claim in the amount of \$211.00 was disallowed.

VI.

Said disallowance of \$211.00 was wrongful, erroneous, and illegal in that said loss of \$9,375.00 was either a business bad debt, a loss incurred in the business of producing a motion picture, to wit, Copacabana, and therefore deductible in full by plaintiff.

VII.

No part of said sum of \$211.00 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid, and owing to plaintiff from defendant.

Eighth Count

I.

Plaintiff, Rose Koch, Incorporates in This Eighth Count, All the Allegations Contained in Paragraphs I to IX Inclusively of the First Count With the Same Force and Effect as Though Fully Set Forth Herein.

II.

In connection with her 1945 income tax return, plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$9,126.41.

III.

Plaintiff incurred a net operating loss for the calendar year 1947 in the amount of \$6,592.72 which

loss is allowable as a net operating loss deduction carryback for the calendar year 1945.

IV.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$3,673.08 in connection with said 1945 income tax return, and on March 15, 1951, plaintiff filed an amended claim for refund in the same amount of \$3,673.08. Said claims were based on the ground that plaintiff was entitled to a net operating loss deduction in the amount of \$6,592.72 for said year and in particular that plaintiff's community property share of her husband's \$18,750.00 chargeable share of the aforementioned \$75,000.00 loss was a loss from the operation of a business regularly carried on by said H. Koch & Sons. A copy of said original claim, marked Exhibit O, and a copy of said amended claim, marked Exhibit P, is attached hereto, and is incorporated by reference.

V.

The Commissioner of Internal Revenue, through the Office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954 that his ruling was that said \$75,000.00 loss was a non-business loss and that therefore plaintiff could not include her community property half of her husband's share of said partnership loss in a net operating loss. Said claims for refund were therefore denied.

VI.

Said disallowance of said claims for refund was wrongful, erroneous, and illegal in that said \$75,000.00 loss and plaintiff's community property half of her husband's share of said partnership loss was either a business bad debt, a loss incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana.

VII.

No part of said sum of \$3,673.08 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, payable and owing to plaintiff from defendant.

Ninth Count

Comes Now Plaintiff, Rebecca Koch Abel, and for a Ninth Cause of Action Against the Defendant Alleges That:

I.

Plaintiff, Rebecca Koch Abel, incorporates in this ninth count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original

claim for refund in the amount of \$605.61, and on March 15, 1951, plaintiff filed an amended claim for refund for said \$605.61 in connection with her 1947 income tax return which represented all of the income tax paid by plaintiff on the said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on her 1947 income tax return in the amount of \$18,750.00, which was plaintiff's share of said \$75,000.00 partnership loss. A copy of said original claim, marked Exhibit Q, and a copy of said amended claim, marked Exhibit R, is attached hereto, and is incorporated by reference.

III.

The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954 that said \$18,750.00 chargeable loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner in 1947 only in the amount of \$1,000.00.

IV.

Subsequently the amount of \$211.22 was refunded to plaintiff of said \$605.61 on the basis said loss was a capital loss and the balance of said claim in the amount of \$394.39 was disallowed.

V.

Said disallowance of \$394.39 was wrongful, erroneous, and illegal in that said loss of \$18,750.00 was either a business bad debt, a loss incurred in the

business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana, and therefore deductible in full by plaintiff.

VI.

No part of said sum of \$394.39 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid, and owing to plaintiff from defendant.

Tenth Count

I.

Plaintiff, Rebecca Koch Abel, incorporates in this tenth count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

In connection with her 1945 income tax return, plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$24,779.04.

III.

Plaintiff incurred a net operating loss for the calendar year 1947 in the amount of \$17,560.46 which loss is allowable as a net operating loss deduction carryback for the calendar year 1945.

IV.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Reve-

claim for refund in the amount of \$605.61, and on March 15, 1951, plaintiff filed an amended claim for refund for said \$605.61 in connection with her 1947 income tax return which represented all of the income tax paid by plaintiff on the said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on her 1947 income tax return in the amount of \$18,750.00, which was plaintiff's share of said \$75,000.00 partnership loss. A copy of said original claim, marked Exhibit Q, and a copy of said amended claim, marked Exhibit R, is attached hereto, and is incorporated by reference.

III.

The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954 that said \$18,750.00 chargeable loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner in 1947 only in the amount of \$1,000.00.

IV.

Subsequently the amount of \$211.22 was refunded to plaintiff of said \$605.61 on the basis said loss was a capital loss and the balance of said claim in the amount of \$394.39 was disallowed.

V.

Said disallowance of \$394.39 was wrongful, erroneous, and illegal in that said loss of \$18,750.00 was either a business bad debt, a loss incurred in the

business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana, and therefore deductible in full by plaintiff.

VI.

No part of said sum of \$394.39 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid, and owing to plaintiff from defendant.

Tenth Count

I.

Plaintiff, Rebecca Koch Abel, incorporates in this tenth count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

In connection with her 1945 income tax return, plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$24,779.04.

III.

Plaintiff incurred a net operating loss for the calendar year 1947 in the amount of \$17,560.46 which loss is allowable as a net operating loss deduction carryback for the calendar year 1945.

IV.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Reve-

nue for the First District of California, an original claim for refund in the amount of \$12,142.17 in connection with said 1945 income tax return, and on March 15, 1951, plaintiff filed an amended claim for refund in the same amount of \$12,142.17. Said claims were based on the ground that plaintiff was entitled to a net operating loss deduction of \$17,560.46 for said year and in particular that plaintiff's \$18,750.00 chargeable share of the aforementioned \$75,000.00 loss was a loss from the operation of a business regularly carried on by said H. Koch & Sons. A copy of said original claim, marked Exhibit S, and a copy of said amended claim, marked Exhibit T, is attached hereto, and is incorporated by reference.

V.

The Commissioner of Internal Revenue, through the Office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954, that his ruling was that said \$75,000.00 loss was a non-business loss and that therefore plaintiff could not include his share of said loss in a net operating loss. Said claims for refund were therefore denied.

VI.

Said disallowance of said claims for refund was wrongful, erroneous, and illegal in that said \$75,000.00 loss and plaintiff's share of same was either a business bad debt, a loss incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to

wit, Copacabana, and in any case constituted a loss from a business regularly carried on by H. Koch & Sons and therefore by plaintiff.

VII.

No part of said sum of \$12,142.17 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, payable and owing to plaintiff from defendant.

Eleventh Count

Comes Now Plaintiff, Maurice P. Koch, and for an Eleventh Cause of Action Against the Defendant Alleges That:

I.

Plaintiff, Maurice P. Koch, incorporates in this eleventh count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

In addition, plaintiff advanced in behalf of Beacon Pictures Corporation \$15,000.00 from the community funds of his wife and himself upon the same basis that said aforementioned \$75,000.00 was advanced. Said \$15,000.00 was also lost in 1947.

III.

Plaintiff and his wife, Daisy Koch, filed separate returns for the year 1947, and did not claim any

portion of said \$18,750.00 chargeable loss and said \$15,000.00 loss on said returns.

IV.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$860.52 and on March 15, 1951, plaintiff filed an amended claim for refund for said \$860.52 in connection with his 1947 income tax return which represented all of the income tax paid by plaintiff on said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on his 1947 income tax return of \$16,875.00 which was plaintiff's one-half community share of his \$18,750.00 chargeable loss on the aforementioned \$75,000.00 loss or \$9,375.00, and his one-half community share of the aforementioned \$15,000.00 loss or \$7,500.00. A copy of said original claim, marked Exhibit U and a copy of said amended claim, marked Exhibit V, is attached hereto, and is incorporated by reference.

V.

The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954, that said \$16,875.00 loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner in 1947 only in the amount of \$1,000.00.

VI.

Subsequently said claim for refund in the amount of \$860.52 was disallowed.

VII.

Said disallowance of the claim for refund was wrongful, erroneous, and illegal in that said loss of \$9,375.00 and said loss of \$7,500.00 were either business bad debts, losses incurred in the business of producing motion pictures, or joint venture losses in the business of producing a motion picture, to wit, Copacabana, and therefore deductible in full by plaintiff.

VIII.

No part of said sum of \$860.52 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid, and owing to plaintiff from defendant.

Twelfth Count

I.

Plaintiff, Maurice P. Koch, incorporates in this twelfth count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

Plaintiff incorporates all the allegations contained in Paragraph II of the eleventh count with the same force and effect as though fully set forth herein.

III.

In connection with his 1945 income tax return, plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$8,993.04.

IV.

Plaintiff incurred a net operating loss for the calendar year 1947 in the amount of \$8,666.79 which loss is allowable as a net operating loss deduction carryback for the calendar year 1945.

V.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$4,649.77 in connection with said 1945 income tax return, and on March 15, 1951, plaintiff filed an amended claim for refund in the same amount of \$4,649.77. Said claims were based on the ground that plaintiff was entitled to a net operating loss deduction of \$8,666.79 for said year and in particular that plaintiff's \$18,750.00 chargeable share of the aforementioned \$75,000.00 loss and said aforementioned \$15,000.00 loss were losses from the operation of a business regularly carried on by said H. Koch & Sons and by plaintiff. A copy of said original claim, marked Exhibit W, and a copy of said amended claim, marked Exhibit X, is attached hereto, and is incorporated by reference.

VI.

The Commissioner of Internal Revenue, through

the Office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954, that his ruling was that said \$75,000.00 loss and said \$15,000.00 loss were non-business losses and that therefore plaintiff could not include his share of said losses in a net operating loss. Said claims for refund were therefore denied.

VII.

Said disallowance of said claims for refund was wrongful, erroneous, and illegal in that said \$75,000.00 loss and plaintiff's share of same and said \$15,000.00 loss were either business bad debts, losses incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana, and in any case constituted losses from a business regularly carried on by H. Koch & Sons and by plaintiff.

VIII.

No part of said \$4,649.77 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, payable and owing to plaintiff from defendant.

Thirteenth Count

Comes Now Plaintiff, Daisy Koch, and for a Thirteenth Cause of Action Against the Defendant Alleges That:

I.

Plaintiff, Daisy Koch, incorporates in this thirteenth count, all the allegations contained in Para-

graphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

In addition, plaintiff's husband, Maurice P. Koch advanced in behalf of Beacon Pictures Corporation \$15,000.00 from the community funds of plaintiff and himself upon the same basis that said aforementioned \$75,000.00 was advanced. Said \$15,000.00 was also lost in 1947.

III.

Plaintiff and her husband filed separate returns for the year 1947, and did not claim any portion of said \$18,750.00 chargeable loss and said \$15,000.00 loss on said returns.

IV.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$860.53 and on March 15, 1951, plaintiff filed an amended claim for refund for said \$860.53 in connection with said return; said claims were based on the grounds that plaintiff was entitled to an additional deduction on her 1947 income tax return of \$16,875.00 which was plaintiff's one-half community share of her husband's \$18,750.00 chargeable loss on the aforementioned \$75,000.00 loss or \$9,375.00, and her one-half community share of the aforementioned \$15,000.00 loss or \$7,500.00. A copy of said original claim, marked Exhibit Y and a copy of said amended

claim, marked Exhibit Z, is attached hereto, and is incorporated by reference.

V.

The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954, that said \$16,875.00 loss was a 1947 loss but that in his opinion said loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner in 1947 only in the amount of \$1,000.00.

VI.

Subsequently, said claim for refund in the amount of \$860.53 was disallowed.

VII.

Said disallowance of the claim for refund was wrongful, erroneous, and illegal in that said loss of \$9,375.00 and said loss of \$7,500.00 were either business bad debts, losses incurred in the business of producing motion pictures, or joint venture losses in the business of producing a motion picture, to wit, Copacabana, and therefore deductible in full by plaintiff.

VIII.

No part of said sum of \$860.53 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, unpaid, and owing to plaintiff from defendant.

Fourteenth Count

I.

Plaintiff, Daisy Koch, incorporates in this fourteenth count, all the allegations contained in Paragraphs I to IX inclusively of the first count with the same force and effect as though fully set forth herein.

II.

Plaintiff incorporates all the allegations contained in Paragraph II of the thirteenth count with the same force and effect as though fully set forth herein.

III.

In connection with her 1945 income tax return, plaintiff duly paid the income tax shown to be due by said return, to wit, the sum of \$9,579.13.

IV.

Plaintiff incurred a net operating loss for the calendar year 1947 in the amount of \$8,666.78 which loss is allowable as a net operating loss deduction carryback for the calendar year 1945.

V.

On or about January 7, 1949, plaintiff duly filed with the United States Collector of Internal Revenue for the First District of California, an original claim for refund in the amount of \$4,797.74 in connection with said 1945 income tax return, and on March 15, 1951, plaintiff filed an amended claim for refund in the same amount of \$4,797.74. Said claims

were based on the ground that plaintiff was entitled to a net operating loss deduction of \$8,666.78 for said year and in particular that plaintiff's one-half community share of her husband's \$18,750.00 share of the aforementioned \$75,000.00 partnership loss and plaintiff's one-half community share of said aforementioned \$15,000.00 loss were losses from the operation of a business regularly carried on by H. Koch & Sons and by plaintiff's husband. A copy of said original claim, marked Exhibit AA and a copy of said amended claim, marked Exhibit BB, is attached hereto, and is incorporated by reference.

VI.

The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954, that his ruling was that said \$75,000.00 loss and said \$15,000.00 loss were non-business losses and that therefore plaintiff could not include her share of said losses in a net operating loss. Said claims for refund were therefore denied.

VII.

Said disallowance of said claims for refund was wrongful, erroneous, and illegal in that said \$75,000.00 loss and plaintiff's husband's share of same and said \$15,000.00 loss were either business bad debts, losses incurred in the business of producing motion pictures, or a joint venture loss in the business of producing a motion picture, to wit, Copacabana, and in any case constituted losses from a

business regularly carried on by H. Koch & Sons and by plaintiff.

VIII.

No part of said \$4,649.77 erroneously retained by defendant has been repaid or refunded, and said sum together with interest thereon as provided by law is due, payable and owing to plaintiff from defendant.

Wherefore, plaintiff, Harold M. Koch, demands judgment against defendant in the sum of \$3,739.90 together with interest according to law on said overpaid taxes, together with plaintiff's costs of suit herein, and for such other and further relief as the Court may find meet and just in the premises.

Wherefore, plaintiff, Bessie Koch, demands judgment against defendant in the sum of \$3,884.08 together with interest according to law on said overpaid taxes, together with plaintiff's costs of suit herein, and for such other and further relief as the Court may find meet and just in the premises.

Wherefore, plaintiff, William L. Koch, demands judgment against defendant in the sum of \$3,739.90 together with interest according to law on said overpaid taxes, together with plaintiff's costs of suit herein, and for such other and further relief as the Court may find meet and just in the premises.

Wherefore, plaintiff, Rose Koch, demands judgment against defendant in the sum of \$3,884.08 together with interest according to law on said overpaid taxes, together with plaintiff's costs of suit

herein, and for such other and further relief as the Court may find meet and just in the premises.

Wherefore, plaintiff, Rebecca Koch Abel, demands judgment against defendant in the sum of \$12,536.56 together with interest according to law on said overpaid taxes, together with plaintiff's costs of suit herein, and for such other and further relief as the Court may find meet and just in the premises.

Wherefore, plaintiff, Maurice P. Koch, demands judgment against defendant in the sum of \$5,510.29 together with interest according to law on said overpaid taxes, together with plaintiff's costs of suit herein, and for such other and further relief as the Court may find meet and just in the premises.

Wherefore, plaintiff, Daisy Koch, demands judgment against defendant in the sum of \$5,658.27 together with interest according to law on said overpaid taxes, together with plaintiff's costs of suit herein, and for such other and further relief as the Court may find meet and just in the premises.

/s/ LEON SCHILLER.

We hereby request and demand a trial by jury on all counts of this complaint.

/s/ LEON SCHILLER.

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause.]

ANSWER

The defendant, United States of America, by its attorney, Lloyd H. Burke, United States Attorney, in and for the Northern District of California, for its answer to plaintiffs' complaint, admits, denies and alleges as follows:

First Count

1. Admits the allegations of Paragraph I, except to deny that any taxes were erroneously, illegally or wrongfully assessed or collected.
2. Admits, except to deny the allegations or implications that plaintiffs duly and correctly reported income, and except to deny the implication or allegation that plaintiffs are entitled to recover any taxes.
3. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph III, except to admit that partnership tax returns were filed for the alleged partnership showing the alleged persons as partners for the years 1945, 1946 and 1947.
4. Denies, except to admit that the alleged partnership was engaged in business of luggage manufacturing. Further answering Paragraph IV, defendant says that the alleged partnership in its 1945, 1946 and 1947, and amended 1947 tax returns

reported its business as only luggage manufacturing.

5. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph V, except as hereinafter admitted or denied. Further answering Paragraph V, defendant alleges that in August, 1946, a corporation named Beacon Picture Corporation was in existence and existed for the purpose of making a motion picture entitled *Copacabana*. In 1946, the alleged partnership, H. Koch & Sons, loaned \$75,000 to said Beacon Pictures Corporation. Defendant denies that this \$75,000 was loaned in connection with the joint venture and denies that any joint venture existed. Defendant admits that the alleged partnership, H. Koch & Sons, acquired an interest in said motion picture which interest entitled it to a share of profits from said production. Said interest was in the nature of additional compensation for the use of said \$75,000 and was granted as an inducement to enter into the loan. Defendant denies that the \$75,000 would be repaid only if the undertaking was successful.

6. Admits, except to deny the allegation or implication that the transfer of said \$75,000 was anything other than a loan.

7. Defendant is without information sufficient to form a belief as to the truth of allegations contained in Paragraph VII, except that defendant admits that the partnership return claimed no \$75,000 loss.

8. Denies, except to admit that the original partnership return reported ordinary net income of \$19,223.18.

9. Defendant has no information sufficient to form a belief as to the truth of the allegations contained in Paragraph IX.

10. Admits, except to deny that plaintiff, Harold M. Koch, and his wife, Bessie Koch, were entitled to a deduction of \$18,750.00.

11. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

12. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that his claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

13. Denies. Defendant says that the amount of \$149.12 was refunded to plaintiff, \$42.12 of which represented interest.

14. Denies.

15. Denies.

Second Count

1. Defendant, United States of America, incorporates in this Count its answers to Paragraphs I to X, inclusive, of the First Count with the same force and effect as though set forth herein.

2. Admits, except to deny plaintiff paid the full tax due for the year 1945.

3. Denies.

4. Denies, except to admit plaintiff filed claims for refund in the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

5. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that his claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

6. Denies.

7. Denies.

Third Count

1. Defendant, United States of America, incorporates in this Third Count its answers to Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. Admits, except to deny that plaintiff, Bessie Koch, or her husband, Harold Koch, were entitled to a deduction of \$18,750.00.

3. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

4. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff

that her claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

5. Denies. Defendant says that the amount of \$149.12 was refunded, \$42.12 of which represented interest.

6. Denies.

7. Denies.

Fourth Count

1. Defendant, United States of America, incorporates in this Fourth Count its answers to Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. Admits, except to deny that plaintiff paid the full tax due for the year 1945.

3. Denies.

4. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

5. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that her claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

6. Denies.

7. Denies.

Fifth Count

1. Defendant, United States of America, incorporates in its Fifth Count its answers to Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.
2. Admits, except to deny that plaintiff, William L. Koch, or his wife, Rose Koch, were entitled to a deduction of \$18,750.
3. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.
4. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that his claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business debt.
5. Denies. Defendant says that the amount of \$149.12 was refunded to plaintiff, \$42.12 of which represented interest.
6. Denies.
7. Denies.

Sixth Count

1. Defendant, United States of America, incorporates in this Sixth Count its answers to Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. Admits, except to deny that plaintiff paid in full the tax due for the year 1945.

3. Denies.

4. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says that the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

5. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that his claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

6. Denies.

7. Denies.

Seventh Count

1. Defendant, United States of America, incorporates in this Seventh Count its answers to Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. Admits, except to deny that plaintiff, Rose Koch, or her husband, William L. Koch, were entitled to deduction of \$18,750 for 1945 or for 1947. Further answering Paragraph II defendant says that plaintiff and her husband also filed separate returns for the year 1947.

3. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defend-

ant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

4. Denies, except to admit that on September 10, 1951, defendant or its agent notified plaintiff that her claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

5. Denies. Defendant says that the amount of \$149.12 was refunded to plaintiff, \$42.12 of which represented interest.

6. Denies.

7. Denies.

Eighth Count

1. The defendant, United States of America, incorporates in this Eighth Count its answers to the allegations contained in Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. Admits, except to deny plaintiff paid the full tax due for 1945.

3. Denies.

4. Denies, except to admit that plaintiff filed claims for refund for approximately the amounts alleged. Defendant says that each claim was for refund of \$3,673.09. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

5. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that her claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

6. Denies.

7. Denies.

Ninth Count

1. Defendant, United States of America, incorporates in this Ninth Count its answers to the allegations contained in Paragraph I and Paragraphs III through IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

With respect to Paragraph II of the First Count defendant admits the allegations contained therein except to deny the allegations or implications that she duly and correctly reported her income and except to deny the allegations or implications that plaintiff is entitled to recover any taxes and except that the defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff resides in San Francisco, California.

2. Denies, except to admit that plaintiff filed an original and amended claims for refund of \$605.61 for 1947 income taxes on June 23, 1949, and March 15, 1951, respectively.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III.
4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV.
5. Denies.
6. Denies.

Tenth Count

1. The defendant, United States of America, incorporates in this Tenth Count its answer to Paragraph I of the Ninth Count with the same force and effect as though set forth at length herein.
2. Admits, except to deny that plaintiff paid the full tax due for 1945.
3. Denies.
4. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.
5. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V.
6. Denies.
7. Denies.

Eleventh Count

1. The defendant, United States of America, incorporates in this Eleventh Count its answers to

the allegations contained in Paragraphs I to IX inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. Admits, except to deny that this transaction was other than a loan and except to deny that the basis of this loan was the same as the basis of the \$75,000 loan.

3. Admits, except to deny that plaintiff, Maurice P. Koch, or his wife, Daisy Koch, were entitled to deductions of \$18,750 or \$15,000 and except to deny that plaintiff suffered a "chargeable" loss in either of these amounts.

4. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23 1949, and the amended claim on March 15, 1951.

5. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that his claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

6. Denies.

7. Denies.

8. Denies.

Twelfth Count

1. The defendant, United States of America incorporates in this Twelfth Count its answers to the allegations contained in Paragraphs I to IX

inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. The defendant, United States of America, incorporates in this Twelfth Count its answer to the allegations contained in Paragraph II of the Eleventh Count with the same force and effect as though set forth at length herein.

3. Admits, except to deny that plaintiff paid in full taxes due for the year 1945.

4. Denies.

5. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

6. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that his claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

7. Denies.

8. Denies.

Thirteenth Count

1. The defendant, United States of America, incorporates in this Thirteenth Count its answers to the allegations contained in Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. Admits, except to deny that this transaction was other than a loan and except to deny that the basis of this loan was the same as the basis of the \$75,000 loan.

3. Admits, except to deny that plaintiff or her husband was entitled to deductions of \$18,750 or \$15,000 and except to deny that plaintiff suffered a "chargeable" loss on either of these amounts.

4. Denies, except to admit that plaintiff filed claims for refund for amounts alleged. Defendant says the original claim was filed June 23, 1949, and the amended claim on March 15, 1951.

5. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that her claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

6. Denies.

7. Denies.

8. Denies.

Fourteenth Count

1. The defendant, United States of America, incorporates in this Fourteenth Count its answers to the allegations contained in Paragraphs I to IX, inclusive, of the First Count with the same force and effect as though set forth at length herein.

2. The defendant, the United States of America, incorporates, in this Fourteenth Count its answer to the allegations contained in Paragraph II of the

Thirteenth Count with the same force and effect as though set forth at length herein.

3. Admits, except to deny that plaintiff paid the full taxes due for the year 1945.

4. Denies.

5. Denies, except to admit that plaintiff filed claims for refund for the amounts alleged. Defendant says the original claim was filed on June 23, 1949, and the amended claim on March 15, 1951.

6. Denies, except to admit that on September 10, 1954, defendant or its agent notified plaintiff that her claim for refund could not be allowed because it had been ruled that the alleged loss was a non-business bad debt.

7. Denies.

8. Denies.

Partial Affirmative Defense

Plaintiffs have not calculated correctly the amount of refund due under their theory.

Wherefore, having fully answered, defendant prays for dismissal of plaintiffs' complaint, for judgment in its favor, for costs and for such other relief as may be just and proper.

/s/ LLOYD H. BURKE,

By /s/ LYNN J. GILLARD,
United States Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed October 24, 1955.

[Endorsed]: No. 15645. United States Court of Appeals for the Ninth Circuit. Harold M. Koch, Bessie Koch, William L. Koch, Rose Koch, Rebecca Koch Abel, Maurice P. Koch, and Daisy Koch, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 17, 1957.

Docketed: July 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,645

United States Court of Appeals
For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
Koch ABEL, MAURICE P. KOCH, and
DAISY KOCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

APPELLANTS' PETITION FOR A REHEARING.

MAX FINK,

LEON SCHILLER,

105 Montgomery Street,

San Francisco 4, California,

*Attorneys for Appellants
and Petitioners.*

FILED

OCT 10 1958

PAUL P. O'BRIEN, CL

[Endorsed]: No. 15645. United States Court of Appeals for the Ninth Circuit. Harold M. Koch, Bessie Koch, William L. Koch, Rose Koch, Rebecca Koch Abel, Maurice P. Koch, and Daisy Koch, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 17, 1957.

Docketed: July 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.